



# NHBP TRIBAL COURT

NOTTAWASEPPI HURON BAND OF THE POTAWATOMI

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<b>CASE NUMBERS: 13-078-CV/TRO 13-079-CV/TRO</b>			
<b>DEAN TENBRINK and TERRY TENBRINK</b>	<b>v.</b>	<b>THE NOTTAWASEPPI HURON BAND OF THE POTAWATOMI TRIBAL COUNCIL and THE NOTTAWASEPPI HURON BAND OF THE POTAWATOMI ELECTION BOARD</b>	
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## OPINION AND ORDER AFTER REMAND

### INTRODUCTION

This case is on Remand from the Nottawaseppi Huron Band of the Potawatomi (NHBP) Tribal Supreme Court for actions consistent with the holdings of the NHBP Supreme Court Opinion entered on July 15, 2013. The parties submitted motions following the entry of the Supreme Court Opinion with the Defendants filing the Defendants' Motion for Order Taking Further Actions Consistent with Supreme Court Decision and the Plaintiffs subsequently filing the Plaintiffs' Motion for Relief from a Statute Declared Unconstitutional by the Tribal Supreme Court, and for the Implementation of the Supreme Court's Decision.

## **STATEMENT OF JURISDICTION**

This Trial Court has jurisdiction over the present case as it is on remand for actions consistent with the holdings of the NHBP Supreme Court Opinion that was entered on July 15, 2013. Further, the present case involves constitutional challenges from two Tribal Members to the NHBP Election Code, a legislative enactment adopted pursuant to the NHBP Constitution.

## **STATEMENT OF FACTS**

The Nottawaseppi Huron Band of the Potawatomi (NHBP) Supreme Court issued its Opinion of the Supreme Court for the Nottawaseppi Huron Band of the Potawatomi ("Supreme Court Opinion") on or about July 15, 2013. The Trial Court Opinion and Orders of March 19, 2013 and April 23, 2013, were upheld in part and reversed in part with the Supreme Court holding Section 2.5 of the Election Code violated the right to the freedom of speech and the right to the freedom of assembly as guaranteed by Article VII § 1(a)(1) of the NHBP Constitution. The case was remanded to the Trial Court for actions consistent with the holdings of the NHBP Supreme Court.

On or about July 31, 2013, the Court received from the Defendants, by and through their attorneys, the Defendants' Notice of Briefing Date for Supplemental Briefing on Issues Left Open by Remand from Supreme Court. The Notice stated that the Defendants Brief would be filed no later than August 9, 2013.

On August 1, 2013, the Defendants requested a transcript of the Oral Arguments before the NHBP Supreme Court.

At 6:20 p.m. on August 9, 2013, the Defendants submitted via email the Defendants' Motion for Order Taking Further Actions Consistent with Supreme Court Decision. Included with the Motion was a partial transcript of the NHBP Election Board proceedings that were held on January 31, 2013.

At 9:09 p.m. on August 10, 2013, the Plaintiffs, by and through their attorney, submitted via email to the Court the Plaintiffs' Notice of Briefing Date for Reply Brief, in Response to Defendants' Supplemental Brief Filed on or About August 9, 2013.

On August 12, 2013, the Court received by mail the Defendants' Motion for Order Taking Further Actions Consistent with Supreme Court Decision, as well as a USB flash drive of the January 31, 2013 proceedings before the NHBP Election Board.

On August 16, 2013, the Defendants filed with the Court the full and complete transcript of the January 31, 2013 proceedings before the NHBP Election Board.

On August 19, 2013, the Court received by mail the Plaintiffs' Notice of Briefing Date for Reply Brief, in Response to Defendants' Supplemental Brief Filed on or About August 9, 2013.

At 10:15 p.m. on August 20, 2013, the Plaintiffs submitted via email the Plaintiffs' Notice of Motion and Brief. This Notice stated that the Plaintiffs would file a motion in this case concerning the remand from the NHBP Supreme Court no later than September 10, 2013.

On August 20, 2013, the Court received by mail the Plaintiffs' Reply Brief in Response to Defendants' Motion and Supplemental Brief.

On August 21, 2013, the Court received by mail the Defendants' Notice of Briefing Date for Reply Brief Issues Left Open by Remand from Supreme Court. The Notice stated the Defendants would file their reply brief no later than August 29, 2013.

At 12:14 p.m. on August 26, 2013, the Court received via e-mail the Plaintiffs' Motion for Relief from a Statute Declared Unconstitutional by the Tribal Supreme Court, and for the Implementation of the Supreme Court's Decision. Two (2) exhibits were attached to this Motion. This e-mail also requested oral argument on this Motion by the Plaintiffs.

On August 26, 2013, the Court received by mail the Plaintiffs' Notice of Motion and Brief.

On August 27, 2013 this Court received the Defendants' Amended Notice of Briefing Date for Reply Brief on Issues Left Open by Remand from the Supreme Court. The Defendants stated that, because of overlapping issues and in the interest of judicial economy, the Defendants would file one brief in response to both the Plaintiffs' Motion and the Plaintiffs' Response to the Defendants' pending Motion, by September 6, 2013.

On August 28, 2013, the Court received by mail the Plaintiffs' Motion for Relief from a Statute Declared Unconstitutional by the Tribal Supreme Court, and for the Implementation of the Supreme Court's Decision.

On September 5, 2013 the Court issued an Order Regarding Status that stated that provided the facts to date and ordered that: the Court shall enter any documents filed via email after 5:00 p.m. on the next business day; the Court shall enter the date of any motions filed as of the day the filing fee is received; the Plaintiffs may submit a brief in response to the brief filed by the Defendants with the Defendants' Brief anticipated by September 6, 2013; and that the Court would set the date for Oral Arguments for both the Defendants' Motion and the Plaintiffs' Motion after all briefs had been filed.

On October 21, 2013, the Court issued a Notice of Status Review Hearing, scheduling Oral Arguments for November 15, 2013 at 10:00 a.m.

On or about October 27, 2013, the Plaintiffs' Attorney advised the Tribal Court Administrator via email that he was not available on November 15, 2013. The parties and the Tribal Court Administrator worked over the next month to set a date agreeable to the parties and the Court. The Plaintiff submitted a Stipulation and Order on or about November 25, 2013 setting the Hearing for January 22, 2014 at 1:00 p.m. As the Stipulation and Order was not signed by the Defendants, the Tribal Court Administrator confirmed the consent of the Defendants. The Court approved the Hearing date of January 22, 2014 on November 25, 2013 and entered the Order on December 12, 2013.

The Hearing was held on January 22, 2014. The parties appeared and, by and through their attorneys, made arguments before this Court.

#### **ANALYSIS: INTRODUCTION**

This case is on remand from the NHBP Supreme Court. The detailed facts of this case prior to the appeal can be found in the Opinion and Orders issued by the Trial Court on March 19, 2013 and April 23, 2013, as well as the Opinion of the Supreme Court for the Nottawaseppi Huron Band of the Potawatomi (“Supreme Court Opinion”) issued on July 15, 2013. As such, only the facts since the issuance of the Supreme Court Opinion are in the Statement of Facts in this Opinion After Remand. To understand the issues on remand, however, the Court shall give a brief summary of the history of this case.

On or about January 15, 2013, Tony Day, a Member of Tribal Council and candidate for Tribal Council in the election scheduled for April 27, 2013, filed a challenge with the Election Board alleging that four candidates for Tribal Council, RoAnn Bebee-Mohr, Rob Larson, Dean TenBrink and Terry TenBrink, had violated Sections 2.3, paragraph 1, 2, 3, 4, 5, 6, and Section 2.5, paragraphs 1, 2, 3, 4, 5 and 6 of the Election Code by participating in an “unauthorized Primary Election” and that “Terry TenBrink also was in Violation of section 2.5 paragraph 2 making a malicious statement about Tony Day...” (See Defendants’ Reply, Exhibit A) On January 31, 2013, the Election Board held proceedings where the parties presented opening and closing statements, examined and cross-examined witnesses and presented evidence. The Election Board issued a document entitled “Decision of Election Board” on February 1, 2013 that stated in pertinent part, “[f]or the reasons stated on the record, the Election Board finds that the following Election Code provisions were violated by each of the Defendants”. (See Defendants’ Reply, Exhibit A) The Election Board then went on to list the Sections of the Election Code they found the Defendants violated with the text from the Election Code. These Sections included: 2.3; 2.4; 2.5; and 2.6. The Complaint filed by Councilman Day and various emails and other documents were attached. To be consistent throughout this Opinion After Remand and to avoid confusion, the Court shall refer to the gatherings of individuals and emails that resulted in the Election Board removing the four candidates from the April 27, 2013 ballot as the “Meetings”.

Three of the candidates who were removed from the ballot, Rob Larson, Dean TenBrink and Terry TenBrink, filed suit after the absentee ballots were mailed. Essentially, the Plaintiffs asked that this Court

declare certain provisions of the Election Code unconstitutional and order that the candidates be placed back on the ballot. The Trial Court immediately scheduled a Hearing where the TenBrinks appeared in pro per and the Defendants appeared. Plaintiff Larson did not appear or submit a Motion for an adjournment and his complaint was eventually dismissed with prejudice.

The Court denied the requests for relief, citing the failure of the Plaintiffs to present any evidence or provide a legal basis, such as precedential or persuasive case law, for their requests. The Plaintiffs then retained an attorney who filed a Motion for a New Trial that this Court denied as to a new trial, but granted as to joining the two suits involving Dean TenBrink and Terry TenBrink into one. The Plaintiffs appealed. The parties filed briefs and made arguments before the NHBP Supreme Court on June 5, 2013.

The NHBP Supreme Court issued the Opinion of the Supreme Court for the Nottawaseppi Huron Band of the Potawatomi on July 15, 2013, stating that “[a]ny reading of Section 2.5 Subsection 2, 3, 4, 6 of the NHBP Election Code leads one to the conclusion these subsections interfere with NHBP Member’s rights guaranteed by the Constitution”. *TenBrink and TenBrink v. NHBP Tribal Council and NHBP Election Board*, No. 13-114-APP, at 6 (NHBP S. Ct. July 15, 2013)

It provided in pertinent part the following reasoning for reaching this conclusion:

In the light of requirement that NHBP elections must provide for the free expression of community will, fundamental fairness and the interpretation of similar language by other tribal courts, this court determines that Section 2.5 of the NHBP Election Code acts as an abridgement of NHBP members right to free expression of speech and peacefully assemble, and is, therefore, void. (*TenBrink* at 7)

While holding that the sections of the Election Code in question were unconstitutional, it found no viable remedy for the Plaintiffs. “The Plaintiffs late filing and limited request for relief does not allow this Court to fashion a remedy of its own devising. The NHBP Courts can only do what the parties request. The judiciary cannot create solutions or remedies on its own initiative.” (*TenBrink* at 9 to 10) The Supreme Court also noted that the Plaintiffs did not file a challenge after the election pursuant to Section 10 of the Election Code.

As part of its Order, the Supreme Court “reverses that portion of the Order of the Trial Court of April 23, 2013 upholding the constitutionality of Section 2.5 of the NHBP Election Code and declares that it is contrary to the NHBP constitution and has no force and effect. This Court affirms the portions of the order denying the Plaintiffs request to be instated candidates for the April 27, 2013 election. All other

portions of Judge Pope's order of April 23, 2013 are affirmed and this matter is remanded to the trial court for actions consistent with this decision." (*TenBrink* at 10)

On or about August 9, 2013, the Defendants, by and through their attorney, filed the Defendants' Motion for Order Taking Further Actions Consistent with Supreme Court Decision ("Defendants' Motion"). In this Motion, the Defendants ask this Trial Court to issue several orders as to the constitutionality of various Sections of the Election Code.

On or about August 19, 2013, the Plaintiffs, by and through their attorneys, filed their Reply Brief in Response to Defendants' Motion and Supplemental Brief Filed on or About August 9, 2013 ("Plaintiffs' Reply"). In this Brief, the Plaintiffs responded to the arguments made by the Defendants, as well as raised additional issues.

On or about August 26, 2013, the Plaintiffs filed the Plaintiffs' Motion for Relief from a Statute Declared Unconstitutional by the Tribal Supreme Court, and for the Implementation of the Supreme Court's Decision ("Plaintiffs Motion"). In this Motion, the Plaintiffs made several requests for orders regarding the constitutionality of various Sections of the Election Code. They also further developed some of the requests in the Plaintiff's Reply Brief, such as the request for this Court to make certain recommendations to the NHBP Tribal Council and other NHBP entities relating to actions taken following the April 27, 2013 election. Finally, the Plaintiffs requested this Court to "exercise its equitable powers to order that after the Council Members Tony Day, Christine Lanning and Dorie Rios have served two years, the Election Board must hold an election for the three positions they currently occupy. This election, to be held on or about April 23, 2015, should be open to all candidates who qualify to run for Tribal Council, including Dean TenBrink and Terry TenBrink, Roann Beebe-Mohr, Rob Larson, Larry Matson, Jimmy TenBrink and Kevin TenBrink." (Plaintiffs' Motion at 10)

On or about September 9, 2013, the Defendants filed their "Reply in Support of Defendants' Motion for Order Taking Further Actions Consistent with Supreme Court Decision and Opposition to Plaintiffs' Cross-Motion" ("Defendants' Reply")

On or about September 29, 2013, the Plaintiffs filed their Reply Brief in Support of Motion ("Plaintiffs' Reply Brief in Support of Motion")

In each of the Plaintiffs' pleadings, additional facts, arguments and/or requests for relief were raised. In their first pleadings after the Supreme Court issued its Opinion, the Plaintiffs Reply, the Plaintiffs argued that the Supreme Court held Section 2.5 as a whole unconstitutional, argued against narrow interpretations of the 2.5 Subsections of the Election Code that did not involve freedom of speech

or freedom of assembly and also asked this Court to review Sections 7.1.3 and 7.1.10 as these Sections involved the consequences possible for violating the Sections held unconstitutional by the Supreme Court. In their next pleading, the Plaintiffs' Motion, the Plaintiffs argue that Sections 2.6.14, 2.6.15(f) and 10 also violate the freedom of speech and are, therefore, unconstitutional. In addition, the Plaintiffs challenge Section 2.2.4 as a violation of the freedom of political expression. In their final pleading, Plaintiffs' Reply Brief in Support of Motion, the Plaintiffs argue that the Trial Court should hold that the entire Election Code is unconstitutional.

The Court specifically notes that the Plaintiffs made new allegations in each of their pleadings to this Court as this process denied the Defendants the opportunity to respond to the Plaintiffs' assertion that this Court should strike down the entire Election Code or their argument that the Defendants should have the burden of proving the constitutionality of each and every Section of the Election Code. As the Defendants consistently argued for a narrow reading of the Supreme Court Opinion, this Court may surmise that the Defendants would argue against the assertion that the Supreme Court found the Election Code as a whole to be unconstitutional. Nonetheless, it must be noted that the Defendants were not provided the opportunity to respond as the Plaintiffs made an argument not asserted previously in their pleadings.

This Court has grouped the facts, arguments and requests that relate to each other to write an Opinion that addresses the overall issues. Where specific facts have been referenced and excerpts have been quoted from the pleadings, the Court has attempted to cite the various pleadings in which the information can be found. However, there may be some instances where the same fact or quotation can be found in more than one document, but only one document is referenced.

#### **ANALYSIS: CONSTITUTIONALITY OF THE ELECTION CODE**

This is the first time that a case has been remanded by the Supreme Court. As such, it is a matter of first impression. "With cases of first impression, the NHBP Tribal Court looks to other courts for guidance to determine what the law shall be at NHBP. All other court opinions whether from a tribal court, state court or federal court are persuasive authority, meaning that the NHBP Tribal Court does not have to follow them, unless required by federal law." (*Chivis et al v. NHBP et al*, No. 12-068-CV at 3, September 26, 2012) "While not binding on this Court, the NHBP Courts may look to the decisions of



the United States Supreme Court or other tribal courts for guidance in interpreting similar constitutional language.” (*TenBrink* at 7)

The Court has reviewed case law from other jurisdictions with regard to the authority of the Trial Court when reviewing cases on remand from a higher court, including the cases referenced in the pleadings submitted by the parties. (See *Quern v. Jordan*, 440 U.S. 332, n. 8 (1997) which quotes and/or references *In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895), *Accord, Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920) and *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); and *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943 (3<sup>rd</sup> Cir. 1985) which, among other cases, quotes *United States ex rel. Johnson*, 531 F.2d 169, 172 (3d Cir.1976) and *United States v. C'irami*, 563 F.2d 26, 33 (2d Cir.1977) on remand 92 F.R.D. 483) This Court hereby adopts the standard that, when the NHBP Supreme Court states that a case is remanded to the Trial Court for actions consistent with this decision, the Trial Court may not review action taken as required by the Supreme Court in its Opinion and Order, but may consider and decide any matters within its jurisdiction that the NHBP Supreme Court left open in its decision.

Both parties submitted motions to this Trial Court that requested clarification as to the impact of the NHBP Supreme Court Opinion on the Election Code with the Defendants filing their motion first. The parties are on the extreme opposite ends of each other with the Defendants requesting a narrow interpretation of the Supreme Court Opinion and the Plaintiffs requesting in their final pleading to this Court that the Tribal Court declare that the entire Election Code is unconstitutional. While it is customary to begin with the requests for relief in the first pleading filed, here the Defendants' Motion, the Court will begin with an analysis of the Plaintiffs' final request to hold that the Election Code is unconstitutional because, if this Trial Court agrees, the analysis of the Defendants' requests would not be necessary.

In their final pleading, Plaintiffs' Reply Brief in Support of Motion, the Plaintiffs argue that the Trial Court should declare the entire Election Code unconstitutional under the following theory:

The Tribal Supreme Court was clearly focusing on the broad issue of constitutionality of the severe restrictions on free speech and assembly, and the related question of whether the Plaintiffs should be reinstated as candidates, and did not have occasion to conduct a line-by-line exegesis of the Election Code to determine exactly which sentences should be repealed and which should survive. Presumably this is why the Supreme Court remanded the case to the Trial Court rather than considering it to be definitively resolved. Since the Supreme Court explicitly stated that the Election Code was unconstitutional, the burden of proof is on the Defendants to show that any parts of this statute should be preserved. (Plaintiffs' Reply Brief in Support of Motion at 13)

To review the Plaintiffs' argument, we must first turn to the Order of the Supreme Court Opinion. The Supreme Court Order states as follows:

This Court, having heard the arguments of the parties and having reviewed the Trial Court Record and Briefs, hereby reverses the portion of the Order of the Trial Court of April 23, 2013 upholding the constitutionality of Section 2.5 of the Election Code and declares that it is contrary to the NHBP constitution and has no force and effect. This Court affirms the portions of the order denying the Plaintiffs request to be instated candidates for the April 27, 2013 election. All other portions of Judge Pope's order of April 23, 2013 are affirmed and this matter is remanded to the trial court for actions consistent with this decision. (*TenBrink* at 10)

The above is the complete text of the Order of the Supreme Court. While there are general references to the Election Code by the NHBP Supreme Court, this Court finds no support for the argument that it struck down the entire Election Code in its July 15, 2013 Opinion as it primarily addressed Section 2.5. This brings us to the Defendants' Motion.

In their Motion, the Defendants request that the Court issue an order declaring that "[t]he unconstitutionality of Section 2.5 is due to the requirements in Subsections 2.5.2, 2.5.3, 2.5.4, 2.5.5, and 2.5.6 that election materials (including email and social media) must be submitted to and approved in advance by the Election Board". (Defendants' Motion at 2) The Court declines to issue such an order. The Defendants are correct that the Supreme Court found that the requirement of submitting campaign materials in advance to the Election Board for its approval violated the NHBP Constitution. However, in so doing, it also discussed the right to the freedom of assembly, as well as the right to the freedom of speech generally. As such, an order stating that "the requirements in Subsections 2.5.2, 2.5.3, 2.5.4, 2.5.5 and 2.5.6 that election materials (including email and social media) must be submitted to and approved in advance by the Election Board" is the only reason that the Supreme Court found Section 2.5 to be unconstitutional is too narrow of an interpretation to reflect the spirit of the Supreme Court Opinion in this case. Further, this Court must remain open and unbiased in order to review any possible future sections adopted into the Election Code that relate to groups of Tribal Members meeting to discuss issues relating to an election.

As the Court is discussing both a request for relief from the Defendants and a request for relief by the Plaintiffs, it shall issue specific holdings for clarity. The Court denies the Plaintiffs' motion to hold

that the entire Election Code is unconstitutional. It also denies the Defendants' motion that this Court issue an order that the unconstitutionality of Section 2.5 is due to the requirements in Subsections 2.5.2, 2.5.3, 2.5.4, 2.5.5, and 2.5.6 that election materials (including email and social media) must be submitted to and approved in advance by the Election Board. As this Court does not find the entire Election Code to be unconstitutional, we must turn to a discussion about the constitutionality of the Sections challenged.

The Court held earlier in this Opinion that it may consider and decide any matters within its jurisdiction that the NHBP Supreme Court left open in its decision. The question to now address is what that jurisdiction is in the present case.

This Trial Court engaged in a very thorough analysis of the authority of the Court in reviewing legislative enactments in *Chivis v. NHBP Tribal Council and Mandoka*, No. 13-043-CV, August 27, 2013<sup>1</sup>. This analysis was based on the Supreme Court Opinion in the present case. Of particular importance in relation to this case is the following excerpt:

Important to this case is that the NHBP Supreme Court struck down a portion of the NHBP Election Code even though it held that the relief requested by the Plaintiffs could not be granted. Although not expressly stated as such, this Supreme Court decision appears to support that the NHBP Tribal Court has the power of judicial review. (*Chivis* at 9)

The Court went on to state:

With the understanding that the NHBP Tribal Constitution is the foundational law for this Nation from which the authority of the branches of government is derived, the affirmation in NHBP Tribal Court and NHBP Supreme Court decisions establishing that legislative enactments cannot conflict with the NHBP Tribal Constitution and the recent decision in *TenBrink* that permits constitutional challenges to legislative enactments regardless of whether the original or amended relief can be granted, it is clear that it is the responsibility of the NHBP Tribal Court to review legislative enactments to determine whether they are constitutional when challenged within the laws of the NHBP and the Court Rules of the NHBP. (*Chivis* at 11)

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<sup>1</sup> The caption on this case was wrong on the Opinion and Order with the Defendant listed as Mr. Brooks, Chief Legal Officer of the NHBP Legal Department, who was actually the Attorney for the Defendants. The proper caption is *Terry Chivis v. NHBP Tribal Council and Homer Mandoka*. A Correction to Caption of Opinion and Order was entered on April 22, 2014. The Court notes for the record that the Court did review all sections cited from *Chivis v. Brooks* in the pleadings by the parties.

The Court then did, in fact, engage in the judicial review of a Code adopted by the NHBP Tribal Council, holding the Code in question in *Chivis* to be constitutional. Although the Plaintiff originally filed an appeal challenging the Court in holding that the Code was constitutional, this appeal was later withdrawn. The Defendants did not appeal. The holding that the Court has the power of judicial review, therefore, remains precedent.

A question in the present case is to what extent the Court has the power of judicial review when the Plaintiffs have added constitutional challenges with every pleading, including making new arguments in their final pleading to which the Defendants did not have an opportunity to respond. In looking at the Supreme Court Opinion for guidance as to what this Trial Court should review, this Court notes that the Supreme Court discussed the Plaintiffs' specific allegations that certain Sections of the Election Code violated freedom of speech and freedom of assembly as guaranteed by the NHBP Constitution. As noted by the Defendants, "the Supreme Court expressed concern that if it simply affirmed this Court's ruling without deciding on the constitutionality of the Election Code, Plaintiff (or similarly aligned individuals) would likely relitigate the constitutional issue at the next election, thus putting the parties in the exact same position as they were in early 2013". (Defendants' Motion at 6 to 7) This Trial Court, in reviewing the Supreme Court Opinion, the transcript of the Oral Arguments before the Supreme Court, the pleadings filed after Remand and the Oral Arguments before this Court after Remand, finds itself in the same position and will, therefore, review the constitutional challenges that were specifically pled by the Plaintiffs, regardless in which pleading. These Sections are: 2.2(4); 2.5; 2.6.14; 2.6.15(f); 7.1.3; 7.1.10; and 10. The Court will address all of the requests relating to these Sections in chronological order, unless grouped together by one or both of the parties. The Court will address any remaining requests after the constitutional analysis of the aforementioned Sections of the Election Code.

Before engaging in the aforementioned discussion, it is important to note that the Defendants have requested guidance from this Court to assist in revising the Election Code. In their Motion, the Defendants reference their duties pursuant to the Constitution:

In particular, the Election Board has the constitutional duty to recommend, and the Tribal Council has the constitutional duty to enact "any changes or additions to Tribal statutes, rules and regulations governing elections...as may be necessary to ensure that Tribal elections are conducted in a manner that is consistent, fair and efficient." NHBP Const. art. V, § 2(b). A more specific order implementing the Supreme Court decision is necessary for the Election Board and the Tribal Council to carry out these duties diligently. (Defendants' Motion at 2)

It should be noted that in the Plaintiffs' Reply, the first pleading filed by the Plaintiffs after Remand, they stated the following with regard to the Defendants' request:

The Plaintiffs recognize that the Court may wish to provide guidance to the defendants on the immediate implications of the Tribal Supreme Court decision, and especially on whether sections of the Election Code closely related to Section 2.5 are still viable. The Plaintiffs also respectfully suggest to the Court possible remedies for actions taken by the Tribal Council and the Election Board that have severely and illegally penalized the plaintiffs and other Tribal members for their participation in the meetings at issue in this case. (Plaintiffs' Reply at 8 to 9)

The Court notes that, while the Court is empowered with the review of legislative enactments to determine whether they conform to the Constitution, the adoption of legislative enactments rests with Tribal Council, pursuant to Article VI of the Constitution. However, in response to the request by the Defendants with the Plaintiffs initially supporting this endeavor and providing their own recommendations on what should be ordered by this Court, this Court shall provide guidance as it deems appropriate.

The Plaintiffs argue that Section 2.2.4 would have a "chilling effect" on the right to freedom of political expression in violation of the NHBP Constitution. Section 2.2.4 states:

A Huron Band Tribal Member is ineligible to be a candidate for the Tribal Council if he/she:

- 4) Has been removed or recalled from any salaried elected or appointed office within the last ten (10) years.

The Plaintiffs contend that this violates the right to freedom of speech based on the following:

While this section essentially repeats the language of Section IV(a)(4) of the Tribal Constitution, if taken literally it would not prohibit the Tribal Council from illegally removing a Tribal Member from a salaried elected or appointed office just for exercising his or her freedom of speech. For example, if this statute were interpreted literally, and the decision of the Tribal Supreme Court in this case was ignored, the Tribal Council could remove a Tribal member from the Gaming Commission just because he announced he was running for Tribal Council, and that removal would prevent him from running for Council for ten years. However, the decision

of the Tribal Supreme Court has made it clear that removing a candidate for exercising his freedom of political expression would violate the Tribal Constitution. As it stands the language of Section 2.2(4) is thus overbroad, and would have a severe “chilling effect” on freedom of speech of Tribal members in a salaried elected or appointed office. (Plaintiffs’ Motion at 6)

The Court finds no merit in this argument. First and foremost, as pointed out by the Defendants, the language in 2.2.4 is almost identical to Article IV, § 4 (a)(4) of the NHBP Constitution which provides in pertinent part:

a) Band members must possess the following qualifications in order to be nominees or hold any office on the Tribal Council:

4) Must not have been removed or recalled from any salaried elected or appointed office within the last ten (10) years, where such conduct does not result in a conviction or plea in a court of competent jurisdiction

The only difference between Section 2.2.4 of the Election Code and Article IV, § 4 (a)(4) of the NHBP Constitution is that the Election Code does not contain the remainder of the Constitutional provision that references “where such conduct does not result in a conviction or plea in a court of competent jurisdiction”. As such, Section 2.2.4 does not conflict with the Constitution, the supreme law of the land.

The Plaintiffs go further by stating that this Section:

While this section essentially repeats that language of Section IV(a)(4) of the Tribal Constitution, if taken literally it would not prohibit the Tribal Council from illegally removing a Tribal Member from a salaried elected or appointed office just for exercising his or her freedom of speech. For example, if this statute were interpreted literally, and the decision of the Tribal Supreme Court in this case was ignored, the Tribal Council could remove a Tribal member from the Gaming Commission just because he announced he was running for Tribal Council, and that removal would prevent him from running for Council for ten years. However, the decision of the Tribal Supreme Court has made it clear that removing a candidate for exercising his freedom of political expression would violate the Tribal Constitution. As it stands the language of Section 2.2(4) is thus overbroad, and would have a severe “chilling effect” on freedom of speech of Tribal members in a salaried elected or appointed office. (Plaintiffs’ Motion at 6)

The Court is not persuaded by this argument. The Supreme Court found a “chilling effect” on speech where there was a requirement to submit campaign materials to the Election Board in advance of using them. The “chilling effect” on speech was on its face versus a hypothetical scenario as proposed by the Plaintiffs. The Court, therefore, denies the Plaintiffs’ Motion to have Section 2.2.4 of the Election Code declared unconstitutional.

The Plaintiffs argue the following Sections are all unconstitutional as a result of the Supreme Court holding that Section 2.5 is unconstitutional: Section 2.6.14 which defines campaigning; 2.6.15(f) which provides the consequences for campaign violations, referencing the right to notice and a hearing as prescribed in Section 10 in the opening paragraph; and Section 10 which defines the process for election challenges. Although the Defendants state in their Reply that all cross-motions by the Plaintiffs should be denied, they state the following in response to the Plaintiffs’ arguments:

First, the Plaintiffs argue that the Court should strike down Section 2.6.14, 1.6.15(f),<sup>2</sup> and 10 of the Election Code. But this claim has been mooted by the Supreme Court’s holding that Section 2.5 is unconstitutional. Plaintiffs do not claim that anything in these three sections operates independently of Section 2.5 to abridge any constitutional rights. Plaintiffs do not even hypothesize a situation where that could occur. (Defendants’ Reply at 12)

This Court agrees that Sections 2.6.14, 2.6.15(f) and 10 as it relates to the process for removing a candidate’s name from the ballot are rendered moot by the Supreme Court holding that Section 2.5 is unconstitutional and thus, does not need to be held unconstitutional by this Court. However, as the Defendants have requested guidance from this Court as it begins the process of revising the Election Code, the Court also notes that the Plaintiffs are correct that, while the right to a notice and hearing are referenced in the opening paragraph of 2.6.15(f) as being found in Section 10, there are no provisions for notice and hearing in Section 10. The Court recognizes that Section 10 involves election challenges and that the allegations would determine whether a hearing is required. However, as the Plaintiffs revise the Election Code, they should be mindful of due process requirements.

The Plaintiffs argue that Sections 7.1.3 and 7.1.10 are unconstitutional as they violate freedom of speech as guaranteed by the NHBP Constitution. These Election Code Sections state as follows:

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<sup>2</sup> The Court finds this to be a typographical error with the Defendants intending to reference Section 2.6.14(f) as Section 1.4.15(f) does not exist, but Section 2.6.15(f) does exist, follows Section 2.6.14 and has been challenged by the Plaintiffs.

7.1.3

A person, or person acting on another's behalf, shall not, directly or indirectly, knowingly make, publish, circulate or place in the public, either orally or in writing, an assertion, representation, or statement of fact concerning a candidate for elected office, that is false, deceptive, or malicious.

7.1.10

Any person who is found guilty of any of these provisions in the Article shall be punished by a fine not exceeding \$5,000.00, or by imprisonment for a term not exceeding 1 year, or both such fine and imprisonment in the discretion of the Court.

In response to the Plaintiffs request to hold these Sections unconstitutional, the Defendants state:

The Plaintiffs add to their assertion of "absolute" rights a request, in their reply and again in their cross-motion, that the Court strike down Sections 7.1.3 and 7.1.10 of the Election Code as unconstitutional because, they argue, they are similar to provisions in Section 2.5. But these sections were not relied on or cited by the Election Board, are not referenced in the complaint, have never been put at issue in this case, and are not properly before this Court. Therefore, the cross-motion seeking a declaratory ruling striking these provisions down should be denied. (Defendants Reply at 10)

This Court finds that it is appropriate to use the power of judicial review to determine whether Sections 7.1.3 and 7.1.10 are constitutional. The first reason for this decision is that the Plaintiffs specifically alleged that these Sections violate the NHBP Constitution. The second is that, although these Sections of the Election Code were not referenced in the document issued by the Election Board in removing the four candidates from the ballot, the allegation that malicious statements were made was a significant focus of the proceedings. As stated in the Defendants' Motion, the original challenge filed alleged that a violation of the Election Code was "Terry TenBrink's dissemination via email of a malicious statement about Mr. Day". (Defendants' Motion at 3) The third reason is that the Defendants have requested that the Court issue an order declaring that "[t]he Election Code cannot prohibit the dissemination of speech that is protected by the First Amendment". (Defendants' Motion at 2) Finally, the specific language of these Sections, the prohibition of speech that is "false, deceptive or malicious" raises significant issues on their face with regard to the right to due process as guaranteed by the NHBP Constitution.



A foundational problem with Section 7.1.3 is that the terms relating to the speech prohibited - “false, deceptive or malicious” - are not defined in the Election Code. “When a term is not defined in a law, Courts frequently turn to the Black’s Law Dictionary for guidance.” (*In re J*, No. 13-052 ECPP at 5, April 5, 2013) The term “false” is defined in the Black’s Law Dictionary as “not true”. The term “malicious” is defined as “characterized by, or involving, malice; having, or done with wicked, evil or mischievous intentions or motives; wrongful and done intentionally without just cause or excuse or as a result of ill will.” The term “deceptive” in and of itself is not defined in the Black’s Law Dictionary. There are phrases with the term “deceptive” as the first word, such as “deceptive advertising”, but “deceptive” is not individually defined.

The Court highlighted the problem of having terms that are not defined in the legislation itself in the case of *In re J*. In that case, a member of the Elderly Protection Team (EPT) filed a Petition for a Person in Need of Care pursuant to the NHBP Elderly Services and Protection Code (“Code”), under the provision that the individual was “living in conditions that were unsafe, unsanitary or dangerous, or causing himself to be in imminent danger”. With the terms “unsafe, unsanitary or dangerous” undefined, the Court expressed the following concerns regarding the application of the Code:

When terms are not defined, and there is little or no guidance in the law to define the terms, there can be no consistency in interpretation. The terms will be defined by whoever is interpreting and applying the law at the time. In practical terms in reference to this Code, it means that the law itself will change according to who is on the EPT. This does not provide notice to the community as to what the law is. (*In re J* at 5)

The Court went on to hold that certain provisions of the Elderly Services and Protection Code were unconstitutional under the “Void for Vagueness Doctrine” in violation of the due process provision of the NHBP Constitution, Article VII § (1)(a)(8). The Court also reviewed the challenged sections of the Elderly Services and Protection Code in relation to the principals of fundamental fairness as discussed in the Supreme Court Opinion *Spurr v. Nottawaseppi Huron Band of the Potawatomi Tribal Council*, stating:

In applying the above to the present case, we consider whether the portions of the Code discussed in this Opinion and Order comport with, or are in agreement or in harmony with, the principles of MnoBmadzewen. With the community not knowing what is required or what is prohibited because key

terms are not defined in the Code, the portions of the Code at issue are not in harmony with MnoBmadzewen. (*In re J* at 7)

In finding certain provisions of the Elderly Services and Protection Code unconstitutional, the Court held that the Code providing a hearing before the Court after the petition was filed was not sufficient to fulfill due process requirements in Article VII § (1)(a)(8) of the NHBP Constitution.

As was the case with *In re J*, we are reviewing a provision in a code that was developed to protect the community with the present case involving the protection of the election process. Section 1.2 articulates the purpose of the provisions in Election Code as follows:

The purpose of this Code is to ensure that procedures used in the Nottawaseppi Huron Band of the Potawatomi Tribal Elections are conducted in a manner that is in accordance with Constitutional requirements and in a consistent, fair and efficient manner.

This Nation gives meaning to the words “consistent, fair and efficient” by rooting them in its traditional values, as it does with the NHBP Constitution and many of its legislative enactments, policies and procedures. This can be found in the hope expressed in Section 1.3.2 of the Election Code which provides in pertinent part:

...the open process by which this Code were developed will also ensure that the Membership of the Nottawaseppi Huron Band of The Potawatomi, including current elected officials, candidates, voters and other persons participating in the election process will be guided by the Seven (7) Grandfather teachings:

Wisdom  
Love  
Respect  
Bravery  
Honesty  
Humility  
Truth

It appears that the Election Board’s goal in drafting this Section is to protect the integrity of the election process by minimizing negative campaigning. Although the goals of the Election Board are admirable, the avenues for achieving those goals must be rooted in the rights as provided in the NHBP Constitution and they must be in harmony with MnoBmadzewen to be upheld by the Court. While terms

should always be clearly defined in any legislative enactment, it is of paramount importance to clearly define terms when a fundamental right articulated in the NHBP Constitution is restricted. Without clear definitions, there can be no consistency in interpretation, with the meaning of these terms being determined by whoever is on the Election Board at the time a challenge is filed. This does not provide sufficient notice to candidates in violation of the due process rights as articulated in Article VII § (1)(a)(8) of the NHBP Constitution and is not in harmony with MnoBmadzewen. This is especially important as Section 7.1.10 contains criminal penalties for engaging in speech that is “false, deceptive or malicious”. For all of these reasons, the Court holds that Sections 7.1.3 and 7.1.10 of the Election Code are unconstitutional.

Intricately intertwined with the Plaintiffs’ request to strike down Sections 7.1.3 and 7.1.10 is the Defendants’ request that the Court issue an order declaring that “[t]he Election Code cannot prohibit the dissemination of speech that is protected by the First Amendment”. (Defendants’ Motion at 2) It is important to recognize that this request is made within the context of an allegation of “defamation”. As stated previously, the Defendants reference in their Motion that one of the initial allegations in the challenge filed against the Plaintiffs for violation of the Election Code was “Terry TenBrink’s dissemination via email of a malicious statement about Mr. Day”. (Defendants’ Motion at 3) The Defendants note that “there were allegations of unprotected speech, including defamation.” (Defendants’ Motion at 9) The Defendants state that “[n]umerous federal courts have observed that election laws can prohibit willfully defamatory or fraudulent speech”. They then devote an entire page to supporting this assertion with case law from foreign jurisdictions. (Defendants’ Motion at 10) Through this presentation of the facts, the case law cited and the request itself, it may appear that the Defendants are seeking to protect their authority to restrict speech. This is not unusual as elections and campaigns, including speech, are regulated in other jurisdictions, arguably to protect the integrity of the election process.

In continuing to provide the guidance requested by the Defendants, the Court encourages the Defendants to review case law from other jurisdictions to determine what, if any, speech will be restricted in the revised Election Code. Through this process, the Defendants will gain a greater understanding around what constitutes defamation in other jurisdictions. This process will also highlight that most jurisdictions have different standards depending on whether a person is a public figure with elected officials, such as Members of Tribal Council, generally classified as public figures. The foundational U.S. Supreme Court case that established that a public figure had to prove the additional element of “actual malice” in an action for defamation is *New York Times v. Sullivan*, 376 U.S. 254 (1964). Such

research will also reveal that there are several defenses to an action for defamation, including that the statement was one of opinion and that the statement was fair comment on a matter of public interest.

When revising the Election Code, the Defendants should be mindful of the test that will be applied by the Court when reviewing any restrictions on speech. “The discussion and holding in *TenBrink* indicates that this Court should apply the three levels of scrutiny adopted in other jurisdictions when determining whether a legislative enactment at the NHBP is constitutional.” (*Chivis* at 16) The Supreme Court noted that “other tribal courts apply strict scrutiny to government action burdening individual speech”. (*Chivis* at 16, quoting *TenBrink* at 7) It then defined this strict scrutiny test as follows:

Once the court determines an action by the tribal government is inconsistent with the NHBP constitution, the tribal government must establish it has a compelling interest in restricting speech and that the limitation is narrowly tailored to meet the tribal government’s interest. (*TenBrink* at 8)

In returning to the specific request by the Defendants for this Court to enter an order declaring that “[t]he Election Code cannot prohibit the dissemination of speech that is protected by the First Amendment,” the Court shall provide an order, but within the sovereign powers of this Nation. While this Court agrees the Election Code cannot prohibit the dissemination of protected speech, it declines to use the language of “the First Amendment”. Pursuant to Article XI § 3(b), the Tribal Court may exercise the judicial power of this Nation consistent with self-determination. When asked to determine the constitutionality of legislative enactments, this Court has consistently analyzed any such provisions within the context of the NHBP Constitution, the supreme law of the NHBP. Support for this approach can be found in the Supreme Court Opinion in this case where it began the constitutional review of the Sections restricting speech by stating that “[t]his court has not issued any opinions of the meaning of the Freedom of Expression section of the NHBP Constitution”. (*TenBrink* at 7) In recognition of the NHBP Constitution as the supreme law of the NHBP and that the NHBP is sovereign nation with the right to self-determination, this Court holds that the Election Code cannot prohibit the dissemination of speech that is protected by Article VII § 1(a)(1) of the NHBP Constitution.

The Defendants requested that the Court issue an order declaring that “[t]he Election Code cannot prohibit ‘groups of people meeting to discuss who may run for office’ in circumstances where these actions do not ‘limit possible candidates’ or restrict any person’s freedom to vote for any candidate in any election”. (Defendants’ Motion at 2) While the Court agrees that the Supreme Court held that the Election Code cannot prohibit groups of people meeting to discuss who may run for office in

circumstances where these actions do not limit possible candidates or restrict any person's freedom to vote for any candidate in any election, it declines to issue such an order. Such an order is too narrow and does not reflect the spirit of the Supreme Court's Opinion. Further, this Court must remain open and unbiased in order to review any possible future sections adopted into the Election Code that relate to groups of Tribal Members meeting to discuss issues relating to an election.

The Defendants requested that the Court issue an order declaring that "[n]othing in this case limits the Election Board's constitutional 'authority to establish the schedule for all elections, and be responsible for settling of election disputes and election challenges' NHBP Const. art. V § 2(d)." This Court agrees and hereby holds that the Supreme Court Opinion in this case does not limit the Election Board's constitutional authority to establish the schedule for all elections, and be responsible for settling of election disputes and election challenges pursuant to Article V, § 2(d) of the NHBP Constitution. In so doing, and in recognition of the concerns raised by the Plaintiffs, the Court notes that a characterization by Tribal Members of a meeting as a "primary election" does not make the meeting an official election action over which the Election Board has any responsibility.

The final request by the Defendants is for the Court to issue an order declaring that "[t]he Election Code cannot require that campaign materials be submitted to or approved by the Election Board, but nothing in this case calls into question the Board's authority to protect the privacy of Tribal voters by restricting candidates' use of voters' address information". (Defendants' Motion at 3) The Plaintiffs stated the following in response:

But there is no reason for the Court to make any rulings about the Election Board's authority to restrict candidates' use of voters' address information. This is not an issue in this case. There would seem to be no reason for the Court to make gratuitous statements about the law on an issue that is not involved in the case before it. (Defendants' Reply at 16)

The Plaintiffs went on to request the following if the Court grants the Defendants' Motion:

However, in the event that the Court should wish to address this issue, the Plaintiffs respectfully ask the Court to rule that any statute that would hinder or prevent Tribal Members from communicating with other Tribal Members on political subjects, or give Council members preferential access to voters over other Tribal members, would violate the Election Code and the Tribal Constitution. (Plaintiffs' Reply at 16)

The Defendants responded by quoting the Plaintiffs as having stated that this is “not an issue in this case” and clarifying “[t]hat is essentially the clarification Defendants seek – that nothing in this case calls such authority into question”. (Defendants’ Reply at 12) They also argued against the additional language suggested by the Plaintiffs. In their final reply, the Plaintiffs disagreed with the characterization of the above referenced statements in the Defendants’ Reply.

Section 2.5 of the Election Code does not contain any provisions relating to the authority of the Election Board “to protect the privacy of Tribal voters by restricting candidates’ use of voters’ address information”. The following are the only provisions in Section 2.5 that could be even remotely considered to relate to that authority:

6. Candidates and/or their supporters are barred from mailing campaign materials to eligible voters independent of the Election Board and are in violation of this Code and may be subject to civil and/or criminal penalties.
7. Candidates are required to pay all costs associated with the mailing of campaign materials which shall include, but not be limited to, copies, envelopes, labels and postage.
8. The Tribal Enrollment office shall supply address labels with the current mailing address of all eligible voting Tribal Members to the Election Board when requested to do so by the Election Board.

The Court does not see any causal relationship between the above Sections and the request from the Defendants nor have the Defendants cited how any of the above provisions could be interpreted as impacting the authority of the Election Board to protect the privacy of Tribal voters by restricting candidates’ use of voters’ address information. The Court has required specific pleadings from the Plaintiffs to review the constitutionality of Sections of the Election Code. It logically follows that the Defendants must submit specific pleadings to receive an order declaring that any provision is constitutional. Based on all of the above, the Court denies the Plaintiffs request.

#### **ANALYSIS: RELIEF FOR INDIVIDUALS WHO ARE NOT A PARTY TO THIS LAWSUIT**

The Plaintiffs allege that “illegal penalties and sanctions have been imposed on Tribal Members for exercising their Constitutional rights to freedom of expression and peaceable assembly”. (Plaintiffs’ Motion at 3) In looking at all of the pleadings submitted by the Plaintiffs, the Plaintiffs have stated that

the NHBP Tribal Council and other NHBP entities have penalized several individuals who participated in the Meetings. These penalizing actions include: the request by the NHBP Tribal Council to create an Office of Special Prosecutor to investigate the issues raised at the January 31, 2013 Election Board Hearing (Plaintiffs' Reply at 5); the removal of one person from the FDA Audit Committee<sup>3</sup> (Plaintiffs' Reply at 13; Plaintiffs' Motion at 3; Plaintiffs' Reply Brief in Support of Motion at 9); the removal of another person as an alternate on the Election Board (Plaintiffs' Reply at 13; Plaintiffs' Motion at 3; Plaintiffs' Reply Brief in Support of Motion at 9 to 10); the removal of two individuals from the Elders Committee and as delegates to the Michigan Indian Elders Association meeting of April 2012 (sic.) (Plaintiffs' Motion at 3 to 4; Plaintiffs' Reply Brief in Support of Motion at 10); and a general denial of applicants to various committees with one example provided in which an individual was not chosen to serve on the NHBP Enrollment Committee or as an alternate for the Election Board. (Plaintiffs' Reply at 13)

The Plaintiffs provided documentation of support in the majority of the above referenced allegations in the various pleadings submitted to this Court. The Plaintiffs did not provide documentation with regard to the removal of the two individuals from the Elders Committee, although the Plaintiffs stated that they were "prepared to provide affidavits, testimony, or both, in support of these facts." (Plaintiffs' Reply at 4; Plaintiffs' Reply Brief in Support of Motion at 10) In addition, the Plaintiffs did not provide documentation regarding the general denial of applicants to various committees. (Plaintiffs' Reply at 13)

The Plaintiffs attached exhibits to their pleadings that the NHBP Tribal Council was seeking feedback on whether to establish an Office of Special Prosecutor. The Plaintiffs provided a copy of a letter that went to all Tribal Members dated March 22, 2013. The letter stated that the purpose of the Office of Special Prosecutor was "to investigate and report any and all potential civil, criminal or constitutional violations related to the activities and events discussed at the January 31 hearing". (Plaintiffs Reply at 5)

The Plaintiffs also provided the letter to the individual removed from the FDA Audit Committee. It states in pertinent part that:

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<sup>3</sup> The individuals that the Plaintiffs assert have been harmed are not a party to this lawsuit. This Court has nothing on file from these individuals as to whether they desire any such relief or even want to be identified in this lawsuit. As such, the Court is not using any of their names in this *Opinion After Remand*.

The FDA Board felt it had no choice but to consider this action in light of evidence that you played a material role (i.e. recording/tallying votes) in "primary election" (sic.) that was determined to have been conducted in violation of the Election Code. (Plaintiffs' Reply, Exhibit G; Plaintiffs' Motion, Second Exhibit, Referred to as "Exhibit G" in Motion)

Finally, the Plaintiffs provided a copy of the email sent to the individual removed as an alternate on the Election Board. That email states in pertinent part that:

...the Board voted unanimously and you have been removed as an alternate from the Election Board. The reason is you had been receiving emails from the group who was engaging activities that were against the Election Code. You failed to bring the activity to our attention. (Plaintiffs' Reply, Exhibit H; Plaintiffs' Motion, First Exhibit, Referenced as "Exhibit H" in the Motion)

In response, the Defendants argue that the Plaintiffs lack standing to request relief on behalf of these individuals, referencing *Funmaker v. Jones* an Opinion issued by the Ho-Chunk Nation Trial Court in 1997. There are, of course, numerous Tribal, state and federal cases that discuss standing. However, as both parties have referenced this case, the Court shall utilize the language used to illustrate the concept of standing in this case:

[S]tanding represents an aspect of justiciability which concerns whether or not a party enjoys a large enough stake in the litigation to obtain a judicial resolution. In order to establish standing, this Court has held that a plaintiff must show he or she has "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," that the injury "fairly can be traced to the challenged action," and the injury is likely to be redressed by a favorable decision." *Funmaker v. Jones et al*, CV 97-72, Ho-Chunk Nation Trial Court (1997) at 10

The Defendants state that the Plaintiffs' request "asks that the Court adjudicate a phantom, unpled complaint for unlawful termination on behalf of absent plaintiffs who do not seek any such relief for themselves. Even if the Plaintiffs had pleaded such a claim they lack standing to seek such relief on behalf of others. See, e.g. *Funmaker v. Jones*, 1 Am Trib. Law 223, 231-233 (Ho-Chunk Nation Trial Court 1997)." (Defendants' Reply at 11) The Defendants are correct. None of the individuals named in the pleadings are a party to this lawsuit. Further, there has been nothing submitted to this Court that indicates that these individuals want to be involved with this lawsuit or even that they desire the relief



requested by the Plaintiffs. The Plaintiffs stating in Footnote 4 in the Plaintiffs' Reply that one of the individuals "will attend the hearing of the oral argument in this case, and is prepared to testify about this matter" is not sufficient to meet the burden.

The Plaintiffs argue that they do have standing on behalf of these individuals, using the harm suffered by the Plaintiffs of being removed from the ballot as the foundation because it was "an injury not only to the Plaintiffs but also to all Tribal members, in that it prevented Tribal members from having any voice in the election of the majority of the Tribal Council". (Plaintiffs' Reply Brief in Support of Motion at 12) In the next section of this *Opinion After Remand*, the Court shall address the relief requested of a special election, but to close out the discussion of the relief sought for the individuals referenced in the Plaintiffs' various pleadings, the Court holds that Plaintiffs argument for standing does not suffice. The exhibits provided indicate that these individuals may have been removed due to their involvement with the Meetings. It should be noted that the Defendants stated in Footnote 3 of the Defendants' Reply that, "[i]f a proper complaint were filed by the proper plaintiffs, the unpled, untried facts alleged by the Plaintiffs in their motion would be shown to be incorrect in crucial respects. For example, at least two of the alleged "removals" were actually voluntary resignations." (Defendants' Reply at 11) If the individuals referenced by the Plaintiffs – or anyone else - suffered harm because of their participation in the Meetings and they want to seek relief, they must properly file their own complaint. The Plaintiffs do not have standing to request relief on behalf of individuals not a party to this lawsuit.

In addition to requesting relief for individuals not a party to this lawsuit, the Plaintiffs make reference to the establishment of the Office of a Special Prosecutor to investigate the events discussed during the January 31, 2013 proceedings before the Election Board. To date, no individual has sought relief from this Court with regard to the establishment of this Office, other than the general request made by the Plaintiffs. With the Plaintiffs making no claims of prosecution under this Office, they do not have standing to make any requests with regard to the establishment of this Office.

#### **ANALYSIS: REQUEST FOR ORDER TO NOT DISCRIMINATE**

The Plaintiffs request that this Court "order the Defendants not to discriminate against the plaintiffs and all those who participated in the meetings at issue in this case, on account of their participation in those meetings". (Plaintiffs' Motion at 8) Once again, the Plaintiffs request relief on behalf of individuals who are not a party to this lawsuit, here all of the individuals who participated in the

Meetings. There is nothing in evidence or on the record that indicates that these individuals have requested this relief. As such, the Plaintiffs do not have standing to request relief for anyone except themselves.

While the Plaintiffs clearly have standing to request relief for themselves, the request for this Court to “order the Defendants not to discriminate” is too broad and vague to grant such relief. Further, the Plaintiffs do not point to any authority under which the Court could grant such general relief.

#### **ANALYSIS: SPECIAL ELECTION**

The Plaintiffs use the reasoning that the removal of the four candidates for violating sections of the Election Code that were later deemed unconstitutional by the NHBP Supreme Court, to argue that the deprivation of these candidates on the ballot caused “enormous damage to this Tribe”. (Plaintiffs’ Reply at 18) The Plaintiffs state:

The “election” of April 23, 2013<sup>4</sup> was not an election within the meaning of Article V, Section 1 of the Tribal Constitution because the voters had no choice, and the reason they had no choice is that well-qualified candidates were excluded at the request of another candidate by the application of an unconstitutional statute. (Plaintiffs’ Motion at 7)

The Plaintiffs state that a special election should be ordered in April of 2015, arguing that the Supreme Court not voiding the election was not a permanent prohibition since the case was remanded to the Trial Court. They go on to state that, “[w]hile the Court did not declare the election void, the Justices also did not suggest or require that the three Council members who were ‘elected’ were entitled to a full term of four years – only that a situation where there was no quorum of Council members would be intolerable”. (Plaintiffs Motion at 7) This characterization significantly minimizes the findings and holdings of the Supreme Court.

The Supreme Court found the lack of remedies to be grounded in the actions of the Plaintiffs:

The TenBrinks did not file their action until after the absentee primary ballots were mailed. The TenBrinks could have filed their action before the ballots were mailed. Once the ballots were mailed their only possible remedy was to ask to stop the entire election process and start over, which they did not. The TenBrinks did not ask to stop the election until they filed

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<sup>4</sup> The correct date of the election was April 27, 2013.

their reply brief on April 17, 2013, ten days before the election and six days before Judge Pope made her final ruling. To invalidate the election at this late date would throw the NHBP into chaos. The previous Tribal Council members terms have expired. Section 2, Article IV-Governing Council provides that council members serve until their successors are sworn into office. If the three winning candidates were disqualified, the Tribal Council would not be able to transact any business since the Council requires a quorum of three. Section 4, Article IV NHBP Constitution. (*TenBrink* at 9)

The Supreme Court also noted that the Plaintiffs did not file a challenge after the election pursuant to Section 10 of the Election Code. “The Plaintiffs late filing and limited request for relief does not allow this Court to fashion a remedy of its own devising. The NHBP Courts can only do what the parties request. The judiciary cannot create solutions or remedies on its own initiative.” (*TenBrinks* at 9 to 10)

The Court is not only limited by the relief requested by the parties, but also by the NHBP Constitution. In *Chivis v. NHBP Tribal Council and Homer Mandoka* the Court engaged in a detailed analysis of the importance of the Constitution. The Court again affirms that the NHBP Constitution is the supreme law of this Nation in the present case.

The Constitution contains numerous provisions regarding elections. While we will not discuss all of the provisions regarding elections, there are three provisions that directly relate to the relief requested by the Plaintiffs.

The first is that Article IV, § 2 (a) states that “[e]ach position on the Tribal Council shall have a term of office of four (4) years”. This is not ambiguous. It is a clear and straight forward provision. The only qualifier regarding the four year term of an individual elected to Tribal Council relates to removal.

The Constitution limits removal to two avenues, specifically removal by the other members of Tribal Council (Article IV, § 8) or removal through a recall petition (Article IV, § 9). It is important to note that the authority of the Court is limited within these avenues of removal. Article IV, § 8 (c) states in pertinent part that, “[t]he removed member shall have the right to appeal the decision of the Tribal Council to the Tribal Court. The Tribal Court may reverse the decision of the Tribal Council only if the Tribal Council violated the laws promulgated in this Constitution.”

In looking at the fact that the NHBP Supreme Court did not void the election, that the Constitution states that the term of office shall be four years and that removal is limited to removal by Tribal Council or through a recall petition, as well as taking into consideration the fact that the Plaintiffs failed to engage in the processes in place to receive the relief they desired, specifically that the Plaintiffs did not file their Complaint before the absentee ballots were mailed, did not request that the election be stopped in a timely

fashion and did not file a challenge after the election, the Court denies the Plaintiffs' request for the order of a special election for the seats filled in the election on April 27, 2013.

**IT IS ORDERED:**

1. In the July 15, 2013 NHBP Supreme Court Opinion issued in the present case, the Supreme Court held that strict scrutiny applied when reviewing legislative enactments that limit the freedom of speech or the freedom of assembly as provided by Article VII § 1(a)(1) of the NHBP Constitution;
2. In the July 15, 2013 NHBP Supreme Court Opinion issued in the present case, the Supreme Court established the test of strict scrutiny when the freedom of speech is limited by the tribal government with the government having to establish that it has a compelling governmental interest in that limitation on speech and that the limitation is narrowly tailored to meet the tribal government's interest;
3. Upon Remand from the NHBP Supreme Court for actions consistent with the Supreme Court Opinion, the Tribal Court may not review action taken as required by the Supreme Court in its Opinion and Order, but may consider and decide any matters within its jurisdiction that the NHBP Supreme Court left open in its decision;
4. In the present case with new requests for relief added by the Plaintiffs in each pleading, this Tribal Court only considered requests that were specifically pled and argued constitutionality or unconstitutionality;
5. In the July 15, 2013 NHBP Supreme Court Opinion issued in the present case, the Supreme Court did not hold that the entire Election Code was unconstitutional;
6. In the July 15, 2013 NHBP Supreme Court Opinion issued in the present case, the Supreme Court held that Section 2.5 of the Election Code was unconstitutional as the government did not meet its burden of establishing a compelling governmental interest in the Election Code for the limitations on the freedom of speech and freedom of assembly as provided in Article VII § 1(a)(1) of the

NHBP Constitution or that the limitations were narrowly tailored to meet the tribal government's interest;

7. This Tribal Court declines to issue an order that the Supreme Court holding of Section 2.5 as unconstitutional was due to the requirements in Sections 2.5.2, 2.5.3, 2.5.4, 2.5.5, and 2.5.6 that election materials (including email and social media) must be submitted to and approved in advance by the Election Board as it is too narrow an interpretation and does not reflect the spirit of the Supreme Court Opinion;
8. This Tribal Court holds that Section 2.2.4 of the Election Code does not conflict with the NHBP Constitution as the language in Section 2.2.4 is almost identical to Article IV, § 4 (a)(4) of the NHBP Constitution;
9. This Tribal Court holds that Section 2.2.4 of the Election Code does not, on its face, violate freedom of speech as provided in Article VII § 1(a)(1) of the NHBP Constitution nor does it, on its face, have a "chilling effect" on the political speech of individuals in a salaried elected or appointed office;
10. This Tribal Court holds that Sections 2.6.14, 2.6.15(f) and 10 have been rendered moot by the Supreme Court Opinion in this case and, therefore, do not require constitutional review;
11. This Tribal Court holds that Sections 7.1.3 and 7.1.10 violate the due process provision of Article VII § 1(a)(8) of the NHBP Constitution and that these Sections are not in harmony with MnoBmadzewen because there are no definitions in the Election Code of, or guidance in the law for, the terms "false, deceptive or malicious" thereby rendering them void for vagueness and depriving Tribal Members of notice as to the speech that is prohibited;
12. This Tribal Court holds that, in recognition of the right to self-determination of NHBP as a sovereign nation and the NHBP Constitution as the supreme law of the NHBP, the Election Code cannot prohibit the dissemination of speech that is protected by Article VII § 1(a)(1) of the NHBP Constitution;

13. This Tribal Court declines to issue an order declaring that the Election Code cannot prohibit groups of people meeting to discuss who may run for office in circumstances where these actions do not limit possible candidates or restrict any person's freedom to vote for any candidate in any election as such an order is too narrow and does not reflect the spirit of the Supreme Court's Opinion of July 15, 2013 in the present case, and because the Court must remain open and unbiased in order to review any possible future sections adopted into the Election Code that relate to groups of Tribal Members meeting to discuss issues relating to an election;
14. This Tribal Court holds that nothing in this case limits the constitutional authority of the Election Board to establish the schedule for all elections, and be responsible for the settling of election disputes and election challenges pursuant to Article V § 2(d) of the NHBP Constitution;
15. This Tribal Court holds that the Plaintiffs do not have standing to request relief for individuals who may have suffered harm as a result of participating in the activities leading to the removal of four candidates for NHBP Tribal Council from the April 27, 2013 ballot, but who are not a party to this lawsuit;
16. This Tribal Court holds that the Plaintiffs do not have standing to make any requests with regard to the establishment of the Office of Special Prosecutor as there has been no evidence entered or arguments made regarding harm suffered by the Plaintiffs;
17. This Trial Court holds that the Plaintiffs do not have standing to request the relief of ordering the NHBP Tribal Council and NHBP Election Board to not discriminate against individuals who participated in the activities leading to the removal of four candidates for NHBP Tribal Council from the April 27, 2013 ballot nor have the Plaintiffs identified any authority under which this Court could issue such an order; and

18. This Tribal Court denies the Plaintiffs' request for the order of a special election for the seats filled in the election on April 27, 2013 as the NHBP Supreme Court did not void the election, Article IV, § 2 (a) of the NHBP Constitution states that the term of office shall be four years, Article IV § 8 provides for removal by Tribal Council, Article IV, § 9 provides for removal through a recall petition, and the Plaintiffs failed to engage in the processes in place to receive the relief they desired, specifically that the Plaintiffs did not file their Complaint before the absentee ballots were mailed, did not request that the election be stopped in a timely fashion and did not file a challenge after the election.

5.7.14

Date

Melissa L. Pope  
Melissa L. Pope, Chief Judge

#### CERTIFICATE OF MAILING

I certify that on this day I mailed a copy of the *Opinion After Remand* by first-class mail to the parties, or their attorneys, at the addresses listed above with proper postage affixed.

5-7-14

Date

Fred Jacko, Jr.  
Fred Jacko, Jr., Acting Tribal Court Administrator